



Michael Preston
Secretary of Commerce,
Executive Director
Arkansas Economic
Development Commission

July 13, 2020

Ms. Marty Garrity
Director
Arkansas Bureau of Legislative Research
State Capitol, Rm. 315
Little Rock, AR 72201

Re: Emergency Rule for Developmental Disabilities Provider Emergency Loan Program

Dear Ms. Garrity:

Enclosed is a proposed emergency rule and necessary attachments for the AEDC Developmental Disabilities Provider Emergency Loan Program ("ELP"). The effect of the rule would be to approve the criteria under which AEDC would originate and service loans to certain developmental disabilities providers who are not eligible for Paycheck Protection Program loans through the U.S. Small Business Administration due to their size. The ELP would be funded by a proposed \$7.8 million CARES Act appropriation which I understand will be considered by PEER on July 21, 2020.

An emergency rule is necessary because of COVID-19's significant economic impact on these developmental disabilities providers. Should AEDC be required to follow the standard APA rule-making process and the attendant delay it would cause in making funds available, the affected providers could be forced to curtail or even suspend operations, severely impacting the clients they serve. AEDC will file the rule for public comment and ALC review under the permanent provisions of the Administrative Procedures Act.

Thank you for considering this proposed emergency rule and our request for a favorable determination.

Sincerely,

A handwritten signature in blue ink, appearing to be "JL Hudson", written over a horizontal line.

James L. Hudson
EVP – Operations & General Counsel

cc: Jessica C. Sutton

QUESTIONNAIRE
FOR FILING PROPOSED RULES WITH THE
ARKANSAS LEGISLATIVE COUNCIL

DEPARTMENT/AGENCY _____
DIVISION _____
DIVISION DIRECTOR _____
CONTACT PERSON _____
ADDRESS _____
PHONE NO. _____ FAX NO. _____ E-MAIL _____
NAME OF PRESENTER AT COMMITTEE MEETING _____
PRESENTER E-MAIL _____

INSTRUCTIONS

- A. Please make copies of this form for future use.
- B. Please answer each question completely using layman terms. You may use additional sheets if necessary.
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this
- D. Rule" below.
- E. Submit two (2) copies of the Questionnaire and Financial Impact Statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

Jessica C. Sutton
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201

1. What is the short title of this rule?

2. What is the subject of the proposed rule?

3. Is this rule required to comply with a federal statute, rule, or regulation? Yes No

If yes, please provide the federal rule, regulation, and/or statute citation.

4. Was this rule filed under the emergency provisions of the Administrative Procedure Act?

Yes No

If yes, what is the effective date of the emergency rule? _____

When does the emergency rule expire? _____

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? Yes No

5. Is this a new rule? Yes No If yes, please provide a brief summary explaining the rule.

Does this repeal an existing rule? Yes No If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

Is this an amendment to an existing rule? Yes No If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled “mark-up.”

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation.

7. What is the purpose of this proposed rule? Why is it necessary?

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b).

9. Will a public hearing be held on this proposed rule? Yes No If yes, please complete the following:

Date: _____

Time: _____

Place: _____

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)

11. What is the proposed effective date of this proposed rule? (Must provide a date.)

12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice. _____

13. Please provide proof of filing the rule with the Secretary of State as required pursuant to Ark. Code Ann. § 25-15-204(e). _____

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT _____

DIVISION _____

PERSON COMPLETING THIS STATEMENT _____

TELEPHONE NO. _____ **FAX NO.** _____ **EMAIL:** _____

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two (2) copies with the Questionnaire and proposed rules.

SHORT TITLE OF THIS RULE

1. Does this proposed, amended, or repealed rule have a financial impact? Yes No
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?
Yes No
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes No

If an agency is proposing a more costly rule, please state the following:

- a) How the additional benefits of the more costly rule justify its additional cost;
- b) The reason for adoption of the more costly rule;
- c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and
- d) Whether the reason is within the scope of the agency's statutory authority, and if so, please explain.

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

b) What is the additional cost of the state rule?

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?
- Yes No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

DEVELOPMENTAL DISABILITIES PROVIDER EMERGENCY LOAN PROGRAM

Overview

As a result of the national COVID-19 pandemic, many nonprofit organizations are facing significant financial struggles resulting in layoffs of employees and curtailment of operations. Developmental Disabilities Providers (the “Providers”) have been hit especially hard due to social distancing measures that have reduced billable services. Providers with fewer than 500 employees have been able to take advantage of the federal Paycheck Protection Program (“PPP”) loans administered through the U.S. Small Business Administration, however Providers with more than 500 employees are not eligible for PPP loans.

The Providers with more than 500 employees have a significant economic impact to the State of Arkansas by providing employment opportunities to the developmentally disabled population and by providing caregiving so that family members may work. The cessation of operations by any of these Providers would have a significant detrimental economic impact on the State of Arkansas.

Based on the forgoing economic development need, and pursuant to the authority granted under Ark. Code Ann. § 15-4-209(a)(1) and § 15-4-209(b)(5), the Arkansas Economic Development Commission (“AEDC”) is establishing this Developmental Disabilities Provider Emergency Loan Program (the “ELP”) to address this need and in so doing benefit the economy of Arkansas.

Section 1: Eligibility Criteria for ELP Loans.

AEDC may provide loans under the ELP to any Provider who:

- A. Is an “accredited nonprofit entity” under Ark. Code Ann. § 20-48-101;
- B. Had at least 500 employees as of February 15, 2020;
- C. Because of the current economic uncertainty pertaining to the COVID-19 pandemic, needs an emergency loan in order to support the ongoing operations of the Provider;
- D. Intends to use the loan proceeds for necessary working capital purposes, including payroll, rent/mortgage payments, and utilities; and
- E. Has been unable to secure the needed working capital through other programs administered by the State of Arkansas or the federal government.

Loans under the ELP must be closed and funded by no later than December 30, 2020. AEDC shall make no loans under the ELP after that date. The maximum aggregate amount of loans that may be funded under the ELP shall not exceed the lesser of i) the amount appropriated by the Legislative Council of the Arkansas General Assembly, or ii) \$7,844,021.

Section 2: AEDC’s Responsibilities under the ELP.

- A. AEDC shall conduct a review of Provider’s business financial statements and any other documents germane to a prudent lender review and satisfy itself as to the credit worthiness of Provider. In making its determination of credit worthiness, AEDC shall be permitted to take into account the current economic circumstances due to COVID-19 to the extent those circumstances may have affected Provider’s credit worthiness. AEDC may also consider the likelihood of loan forgiveness pursuant to these rules in assessing Provider’s credit worthiness.

- B. AEDC will document the loan using forms of loan agreements and promissory notes as is customary for loans of the amounts and duration available under the ELP.
- C. AEDC shall maintain all the loan instruments in its files pursuant to its record keeping policies, receive all payments of principal and interest on the loan, and take any other action as may be required or appropriate to administer and service the loan in accordance with the normal practices of prudent lenders for the type and amount of the loan, including, without limitation:
 - 1. Make or consent to any transfer or assignment of the loan and any note or interest therein or any material alteration in the terms of any loan instrument;
 - 2. Modify any repayment terms;
 - 3. Waive or release any claim against the borrower, surety, guarantor, or other obligor, or any other creditor of trustee in bankruptcy, arising out of any loan instrument; and
 - 4. Pursue collection of any unpaid amounts owing under a loan, including the commencement of legal proceedings against a Provider.

Section 3: Application for an ELP Loan.

- A. To apply for an ELP loan, a Provider shall submit an application on a form prescribed by AEDC along with any required supporting documentation requested by AEDC.
- B. AEDC shall evaluate each application and any supporting documentation to determine whether it will provide a loan to Provider. AEDC's approval or disapproval of a loan application is within the sole discretion of AEDC's Executive Director. The Executive Director's determination shall be conclusive and final.
- C. Following approval of the borrower's loan application, AEDC will notify Provider of the proposed terms of the loan, including principal amount, interest rate (if any), duration, collateral description and value (if any), and all other relevant information.

Section 4: Loan Terms.

- A. The principal amount of a loan under the ELP may not exceed an amount equal to the product of the number 2.5 multiplied by the Provider's average monthly payroll for 2019, excluding any amounts paid to an employee over \$100,000 on an annualized basis. In calculating the maximum principal amount of an ELP loan, AEDC shall follow the rules and methodology of the United States Small Business Administration under the PPP, including approved alternative methods for calculating average monthly payroll. Provider shall, upon request by AEDC, provide such documentation as AEDC may reasonably require which evidences Provider's average monthly payroll.
- B. ELP loans shall be for a term of up to two years. No principal payments on the loan shall be due until the loan maturity date. In the event of any default under a loan instrument by a Provider, AEDC may elect to accelerate the maturity date of the loan and demand payment in full.
- C. ELP loans shall not bear interest unless there is an event of default under a loan instrument which is not cured within 30 days to the reasonable satisfaction of AEDC. Following an event of default, the unpaid principal amount shall bear interest at the judgment rate under Arkansas law.

Section 5: Loan Forgiveness.

- A. Loans under the ELP shall be completely forgivable under the same terms and methodology as loans are forgiven under the PPP administered by the United States Small Business Administration.
- B. The unpaid principal amount of an ELP loan shall be forgiven to the extent of the sum of the amounts specified in Section 5(c) paid by a Provider during the 24-week period immediately following the closing of the loan (the “Covered Period”).
- C. The following categories of expenses paid by the Provider during the Covered Period shall be considered for purposes of loan forgiveness under this Section 5:
 - 1. Payroll costs consisting of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation;
 - 2. Mortgage interest payments (but excluding amounts attributable to principal) for real property owned by Provider;
 - 3. Rent payments for facilities leased by Provider; and
 - 4. Utility payments for Provider’s facilities.
- D. If the average number of full-time employees during the Covered Period is less than during the period applicable to calculating the loan amount in Section 4(A), the total eligible expenses available for forgiveness will be reduced proportionally by the percentage reduction in full-time employees.
- E. For each new employee in 2020 and each existing employee who was not paid more than the annualized equivalent of \$100,000 in any pay period in 2019, the Provider must reduce the total forgiveness amount by the total dollar amount of the salary or wage reductions that are in excess of 25 percent of base salary or wages during the Covered Period. This reduction calculation is performed on a per employee basis, not in the aggregate.
- F. At least 60% of the expenses counted toward loan forgiveness must be attributable to payroll costs under Section 5(c)(1). In the event less than 60% of the expenses are attributable to payroll costs, the expenses attributable to Sections 5(c)(2)-(4) shall be reduced so that payroll costs account for 60% of the total expenses counted toward forgiveness.

Section 6: CARES Act Compliance.

- A. AEDC shall fund and administer ELP loans consistent with the requirements of Section 5001 of the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act.”).
- B. A Provider receiving an ELP loan shall be obligated to promptly repay any loan amount to AEDC if it is subsequently determined that Provider’s loan is not allowable under the CARES Act or if Provider fails to use the loan proceeds consistent with the requirements of the CARES Act.



**STATE OF ARKANSAS
BUREAU OF
LEGISLATIVE RESEARCH**

Marty Garrity, Director
Kevin Anderson, Assistant Director
for Fiscal Services
Tim Carlock, Assistant Director
for Information Technology
Matthew Miller, Assistant Director
for Legal Services
Estella Smith, Assistant Director
for Research Services

MEMORANDUM

TO: Members, ALC – Executive Subcommittee

CC: Marty Garrity, Director, Bureau of Legislative Research;
Jessica Sutton, Administrator, Administrative Rules Review Section, Legal
Services Division

FROM: Suba Desikan, Legislative Attorney, Administrative Rules Review Section,
Legal Services Division

DATE: July 23, 2020

SUBJECT: Legal Authorization for the Arkansas Economic Development Commission's
Emergency Promulgation of the Developmental Disabilities Provider
Emergency Loan Program

The Arkansas Economic Development Commission (AEDC) is proposing an emergency rule outlining the administration of a loan program funded through the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act, to assist developmental disabilities providers with over 500 employees that are experiencing significant hardship due to COVID-19. Developmental disabilities providers with more than 500 employees, who are not eligible for federal Paycheck Protection Program (PPP) loans, have a significant statewide economic impact by providing employment opportunities to the developmentally disabled population and by providing caregiving so that family members may work. The proposed rule outlines the eligibility criteria, application process, loan terms, AEDC responsibilities, and the terms of loan forgiveness under the program. AEDC will administer the program in accordance with the CARES Act.

AEDC has authority to administer grants, loans, cooperative agreements, tax credits, guaranties and other incentives, memoranda of understanding, and conveyances to assist with economic development in the state. *See* Ark. Code Ann. § 15-4-209(a)(1). Additionally, AEDC has authority to promulgate rules necessary to implement the programs and services offered by the commission. *See* Ark. Code Ann. § 15-4-209(b)(5).